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No. 86-319

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In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN R. VAN DRASEK, PETITIONER

v.

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT**

**MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION**

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that the district court, affirmed by the court of appeals, improperly refused to hear his complaint that the United States Navy denied him and others their First and Fifth Amendment rights in connection with his complaint against his commanding officer, filed pursuant to Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938.

1. a. In April 1982 petitioner, then a Captain in the United States Marine Corps, was passed over for promotion to Major. In September and October 1982, he filed a complaint against his commanding officer under Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938.¹ The complaint charged that petitioner had been

¹Article 138 provides:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any

improperly transferred from one post to another and improperly removed from a six-month service assignment on an administrative discharge board. It asserted that petitioner's transfer and removal were in retaliation for the way he had voted during his tenure on the discharge board. The complaint also alleged that improper command influence had been exerted by his commanding officer on other military personnel with regard to how they voted while on court-martial and administrative discharge boards and with regard to how they testified in judicial and administrative discharge actions. Pet. App. A3.

b. The Commanding General appointed Colonel Curtis G. Lawson to investigate petitioner's complaint against his commanding officer (C.A. App. 49-50). Colonel Lawson's report concluded that the commanding officer did not commit the wrongs alleged but that some officers did feel subject to pressure with regard to testifying and voting in court-martial and administrative discharge proceedings. Colonel Lawson accepted the commanding officer's reasons for petitioner's transfer, which included dissatisfaction with his performance. Pet. App. A4. The Commanding General's response to the complaint and investigation was, *inter alia*, to direct that proper practices be followed in staffing discharge boards and that petitioner's commanding officer make clear to his subordinates that there would be no improper influence on administrative or judicial actions. *Ibid.*

superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

This disposition was reviewed by the Office of the Judge Advocate General of the Navy and approved by the Secretary of the Navy (Pet. App. A4; C.A. App. 81-82).

c. Petitioner asked the Board for the Correction of Naval Records (BCNR) to "[m]ake certain revisions of the record of proceedings regarding [the Article 138] complaint * * * or cause a new investigation of the complaint to be conducted" (C.A. App. 15). He also asked the BCNR to review his failure to be promoted in April 1982 and a second pass-over in March 1983 (*id.* at 14-15, 18, 23). The BCNR determined, with respect to the Article 138 complaint, that "this request * * * is beyond the scope of corrections traditionally made by the Board" (*id.* at 15), and "particularly note[d] that this record of proceedings does not appear in [p]etitioner's military personnel record" (*id.* at 22). The BCNR found no unfairness in the failure to promote petitioner (*id.* at 23).

d. When petitioner was passed over for promotion a second time, this automatically subjected him to mandatory discharge (C.A. App. 18). Petitioner filed a complaint in the United States District Court for the District of Columbia, challenging the anticipated discharge. He claimed "that his first and fifth amendment rights were violated incident to [his Article 138 complaint]" and that his failure to be promoted was improper and retaliatory (Pet. App. A2). The district court dismissed petitioner's Article 138 claim for lack of jurisdiction (*ibid.*), finding as it did so that "the processing of [petitioner's] Article 138 complaint comports with constitutional requirements" (*id.* at A6). The court affirmed the BCNR's determination with respect to petitioner's promotions as based on substantial evidence (*id.* at A7).

e. Petitioner appealed to the District of Columbia Circuit, which ruled that under the Federal Courts Improvement Act, 28 U.S.C. 1295(a)(2), jurisdiction to hear the appeal lay exclusively with the Federal Circuit (Pet. App.

A9-A18). Accordingly, the appeal was transferred to that court pursuant to 28 U.S.C. 1631 (Pet. App. A18). The Federal Circuit affirmed summarily on the basis of the district court's opinion (*id.* at A1).

2. Petitioner raises no issue that merits this Court's attention, and the unpublished Federal Circuit and district court decisions were correct.

Petitioner does not appear to challenge the BCNR's decision sustaining the denial of his promotion to major, or its "deni[al][of] procedural and substantive review of his Article 138 complaint" (Pet. 7). The sole question presented by the petition for a writ of certiorari is whether the district court erred in its disposition of his Article 138 claim.

a. The district court correctly dismissed, for want of jurisdiction, petitioner's request that the district court review the Article 138 proceeding. As the district court explained, there is no statutory authority for judicial review of such internal military proceedings. Pet. App. A5-A6. Petitioner cites no case in which a court undertook review of an Article 138 proceeding, and we are aware of none. See, e.g., *Mollnow v. Carlton*, 716 F.2d 627, 629 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); *Cortright v. Resor*, 447 F.2d 245, 253 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972) (Friendly, J.) ("We do not sit as a super-Judge Advocate General to review determinations under [Article 138]" (citation omitted)).²

b. While declining to review the Article 138 proceeding generally, the district court *did* in fact review the proceeding for constitutional violations, but found none. It found, rather, that "the processing of [petitioner's] Article 138

²In *Colson v. Bradley*, 477 F.2d 639 (8th Cir. 1973), and *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969), the military was ordered to conduct an Article 138 proceeding; here, petitioner wants the completed proceeding reviewed. See *Ayala v. United States*, 624 F. Supp. 259, 262-263 (S.D.N.Y. 1985).

complaint comports with constitutional requirements" (Pet. App. A6). The court explained that "[t]he [Article 138] investigation, report of findings, and remedial action satisfy the minimum standards of procedural due process" and that petitioner's "allegations of first amendment violations similarly do not warrant relief" (*ibid.* (citations omitted)).³

c. Finally, the district court's finding that there were no constitutional defects in the Article 138 proceeding was correct. Petitioner's First Amendment claim that his right to free expression was chilled by his commanding officer's improper evaluation and transfer of him is insubstantial as both a factual and a legal matter and does not present the extraordinary circumstances necessary to justify judicial intervention into military matters. Cf. *Parker v. Levy*, 417 U.S. 733, 758 (1974); *Cortright v. Resor*, 447 F.2d at 254-255. Regarding his claim that the First Amendment rights of third parties were violated by improper command influence, petitioner has no standing (see, e.g., *Warth v. Seldin*, 422 U.S. 490, 499-502 (1975)), and, in any event, he was not entitled to use an Article 138 proceeding for such a third-party challenge (see *Turner v. Callaway*, 371 F. Supp. 188, 190 (D.D.C. 1974); Gov't App. Br. 40, 43 (discussing relevant regulations)). Petitioner also claimed below that the Article 138 proceedings violated his right to due process, but this assertion also has no merit. The Article 138 charge was fully investigated: the Commanding General appointed an investigator who made balanced findings; the Commanding General's disposition of the complaint reflected those findings; and this disposition was in turn reviewed by the Office of the Judge Advocate General of the Navy and approved by the Secretary of the Navy.

³Petitioner concedes that "[t]he Federal Circuit, although it has not applied [petitioner's proposed standard of review] itself, has cited [it] with approval and criticized a district court for not properly applying the test" (Pet. 10 (citation omitted)).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1986